Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

No. 94-1245

In the Supreme Court of the United States

OCTOBER TERM, 1994

EUGENE F. BEVACQUA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act for an injury caused by a customs inspector while performing a pat-down border search upon petitioner, who sought to enter the United States but resisted the customs officials' request for proper identification and inspection.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 41a-42a) is unpublished, but the decision is noted at 39 F.3d 1186 (Table). The opinion of the district court (Pet. App. 1a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1994. The petition for a writ of certiorari was filed on January 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 21, 1990, at the United States/Canada border crossing at Eastport, Idaho, two customs officials

asked petitioner, who desired to enter the United States, to produce identification. Pet. App. 2a-5a. At the time, petitioner was the brakeman on a four-person train crew employed by the Union Pacific Railroad Company (UP). He was entering the United States after having crossed the border into Canada on the train's engines to haul a string of Canadian freight cars into the United States. *Id.* at 2a, 5a, 9a.

In the past, customs officials at the Eastport port of entry had allowed the UP trains and train crews "to pass back and forth across the border with only cursory examination," without stopping the train to inspect the cargo, or personally questioning or inspecting the crews. Pet. App. 3a. Customs had begun a temporary heightened inspection of the UP trains and crews, however, the day before petitioner's entry. The heightened inspections were a response by the customs officials to UP's failure to resolve their complaints that the noise from UP's trains had risen to such a level that it was interfering with the activities of the customs officials at the inspection station, including making it difficult to communicate with people crossing the border. *Ibid.*

The first heightened inspection took place on May 20 and did not involve petitioner. Pet. App. 4a. The crew members were required to produce their drivers' licenses for identification instead of their UP identification cards, which were deemed inadequate because they did not include a date of birth.[1] *Ibid.* When the members of the next day's crew, including petitioner,

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[1] The Customs Service routinely asks persons crossing the Canadian border for identification that includes a date of birth, which is necessary to check for criminal records, outstanding warrants, or non-admissibility into the United States. See C.A. Supp. Rec. Excerpts 10, 150, 157.

learned of the upcoming heightened inspection, they agreed among themselves that they would only minimally comply with customs service requests and would provide only their railroad identification cards. *Id.* at 4a-5a.

When petitioner's crew crossed into the United States on May 21, they were told to stop the train and come into the depot. Pet. App. 5a. Two customs officials met with the crew and had the conductor verify his signature on the cargo manifest.[2] The conductor reluctantly signed the form and then telephoned his supervisor, who told the conductor that the crew should comply with the customs officials' directions. *Ibid.*

The customs officials asked all crew members to produce identification. The crew members initially refused, but when the customs officials told them they could not proceed until they complied, they showed their railroad cards, "as they had previously agreed." Pet. App. 5a. The customs officials stated that the railroad identification cards were inadequate because they did not bear a date of birth. "Somewhat reluctantly," three of the crew members produced their driver's licenses. Petitioner, however, appeared especially upset, "was obdurate and obstreperous," and "uttered his displeasure with comments such as 'this is bullshit.'" *Ibid.* Petitioner "eventually tossed his driver's license through the air onto the table in front of" one of the customs officials. *Id.* at 5a-6a. The other official decided to take petitioner to the secondary inspection area, away

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[2] The inspectors had reason to believe that the railroad's cargo manifests were not being properly executed and that the conductors' signatures, which were required to be on the manifests, were being forged by the railroad clerks. C.A. Supp. Rec. Excerpts 15-16, 201-202. Such forgery would violate 18 U.S.C. 496.

from the public thoroughfare, before allowing him to proceed. *Id.* at 6a, 31a-32a. The secondary inspection area was outside the railroad depot in the Port of Entry building. *Id.* at 7a.

Petitioner refused to accompany the customs official to the other inspection area and "the trouble began." Pet. App. 6a. The customs official took petitioner by the arm to escort him. Petitioner resisted both physically and verbally. When they got outside, petitioner "resisted even more" and the official placed petitioner in a "come-along-hold" and forced him to the secondary inspection area. The official "did not use excessive force," but petitioner's resistance was "not * * * passive," and petitioner not only "vocally" but also "physically and forcibly resisted being taken to secondary." *Id.* at 7a, 34a-35a.[3]

When the inspector finally got petitioner to the secondary inspection area, he maneuvered petitioner up to a counter, told him to place his hands on the counter, to step back, and to spread his legs. Pet. App. 7a-8a. Petitioner "continued to resist, and refused to comply." *Id.* at 8a. Therefore, another inspector held petitioner's hands to the counter, while the first official forced his own left foot between petitioner's closed feet and, with a standard "slide kick," spread petitioner's legs. *Ibid.*

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[3] Petitioner's continued resistance may have violated 18 U.S.C. 111(a), which makes it unlawful, *inter alia*, forcibly to resist, oppose or interfere with a customs official who is engaged in the performance of official duties. Violation of Section 111(a) is a felony punishable by up to three years' imprisonment. The Port Director examined the relevant statute, but exercised his discretion not to arrest petitioner, in part because the crew would not have been able to move the train through customs for inspection and continue on its run without its brakeman. C.A. Supp. Rec. Excerpts 180.

Having his legs forced apart aggravated a preexisting condition and injured petitioner's knee. *Id.* at 8a-10a.

2. Petitioner filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging that the United States Customs Service, through the actions of its customs official, "negligently, willfully, wantonly, intentionally and maliciously intimidated and assaulted" him and "kicked [his] left knee causing severe personal injury." C. A. Rec. Excerpts, Tab C.R. 1, at 2. After a bench trial, the district court entered judgment for the United States and dismissed the complaint. Pet. App. 1a-39a.

The district court observed that the FTCA waives the United States' immunity for the tortious acts of its employees "only if such torts committed in the employ of a private person would have given rise to liability under state law." Pet. App. 10a-11a; see 28 U.S.C. 2674. With regard to petitioner's claim of an intentional tort, the court held that the FTCA does not waive immunity for any claims arising out of assault, battery or false arrest. Pet. App. 11a, citing 28 U.S.C. 2680(h). Although the court erred in this regard, see pp. 7-8, *infra*, the error was not prejudicial because the court went on to rely on alternative grounds for dismissing petitioner's claim. The court examined whether petitioner had a viable assault, battery or false imprisonment claim under the relevant state law and found that he did not, because petitioner had failed to prove malice or criminal intent on the part of the customs official, as would be required under Idaho law. Pet. App. 35a-36a. The court also found that the customs official had not kicked petitioner in the knee as alleged and that the injury was caused by the official's forcing of petitioner's feet apart in accordance with standard customs procedure. *Id.* at 8a.

With regard to possible claims of negligence, the court noted that petitioner contended that he was not claiming negligence. Pet. App. 11a. The court nevertheless construed petitioner's argument that the customs officials breached a duty to follow customs regulations and policies as constituting such a claim. See *id.* at 11a-12a. The court examined the elements of a common law negligence action under Idaho law and concluded that the customs official breached a legal duty not to conduct pat-down searches without minimal suspicion of wrongdoing,[4] and that that breach was a proximate cause of an injury to petitioner that caused actual damage. *Id.* at 13a. The court held, however, that, under Idaho law of comparative negligence, the government was not liable because petitioner was negligent in not complying with his legal duty not to resist an arrest,[5] because petitioner's negligence was a proximate cause of his injury, and because his negligence was as great as the government's. *Id.* at 14a, 38a.[6]

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[4] But see note 6, *infra*.

[5] The court held that, under Idaho law, petitioner had a duty not to resist an arrest by the customs official unless the official initiated violence or used excessive force, which the court found the official had not done. See Pet. App. 7a, 33a-35a, 37a-38a.

[6] The district court rejected petitioner's constitutional tort arguments against the United States because there was no waiver of sovereign immunity as to such claims. Pet. App. 14a-16a. Notwithstanding that ruling, the court analyzed whether the search of petitioner was reasonable and held that it was. *Id.* at 37a. The court concluded that the customs officials did not initially have sufficient suspicion to justify a pat-down search of petitioner. See *id.* at 16a-33a. The court found, nonetheless, that "the actual pat-down search that occurred was reasonable due to [petitioner's] resistance and failure to comply with the agent's directives to go with him to 'secondary.' [Petitioner's] active and forceful resistance to being taken to secondary gave [the custom official]

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 41a-42a. The court noted that "a pat-down search is considered a routine border search requiring no justification." *Id.* at 41a. It reasoned that the pat-down search of petitioner therefore was not a " 'negligent or wrongful' act in itself." *Ibid.* It also agreed with the district court that the customs official did not use excessive force or deviate from standard procedures in performing the search. *Ibid.* The court reasoned that if a government employee has not committed a "negligent or wrongful act," there is no liability under the FTCA. *Id.* at 41a-42a, citing 28 U.S.C. 1346(b); *Laird* v. *Nelms*, 406 U.S. 797, 799 (1972). Although the court considered government employee conduct here to have been abusive, the court ruled that it was not tortious. Pet. App. 42a.

ARGUMENT

Petitioner contends (Pet. 7-9) that the court of appeals' unpublished decision conflicts with other decisions by that and other courts of appeals regarding the standard for justifying pat-down searches at the border. Petitioner also argues (*ibid.*) that the search was retaliatory and that the court of appeals erroneously held that such a search was routine.

The Federal Tort Claims Act grants federal courts jurisdiction to hold the United States liable for personal injury caused by a negligent or wrongful act of a federal employee only if that act would be the basis for liability

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the minimal or mere suspicion necessary to justify a pat-down search." *Id.* at 37a. The court found that "by reason of the prior resistance" of petitioner, the customs official "had a valid basis to perform a pat-down or frisk search" of petitioner and that the customs official "did not use excessive force in conducting that search." *Id.* at 38a.

of a private person in like circumstances under the law of the place where the act occurred. 28 U.S.C. 1346(b), 2674; *Laird* v. *Nelms*, 406 U.S. at 799. Contrary to the district court's ruling, an action for assault and battery by a federal investigative or law enforcement officer is cognizable under the FTCA. See 28 U.S.C. 2680(h) (barring claims for assault and battery and various other intentional tort claims under the FTCA, except with regard to allegations of certain torts (including assault and battery) arising out of acts or omissions of federal investigative or law enforcement officers). Thus, the government would be liable to petitioner if a private person in like circumstances would be liable under Idaho law.[7]

The district court held that petitioner failed to establish that the government was liable under Idaho assault, battery or false imprisonment law. Pet. App. 35a-37a. That determination was based on Idaho law regarding the level of malice that must be established to make out such a claim. *Ibid.* The district court also held that petitioner failed to establish that the government was liable for a negligent tort because of Idaho's comparative negligence law. *Id.* at 14a, 38a. These state law determinations were dispositive, and this case therefore does not present an appropriate vehicle for review of any purported conflict regarding federal standards for reasonableness of a pat-down border search.

Moreover, petitioner's repeated assertion (Pet. i, 2, 4, 5, 7, 8, 9) that the pat-down search of petitioner was done in retaliation for the noise problem is inaccurate. The customs' officials retaliatory conduct consisted of the

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[7] Petitioner conceded below that Idaho law is the state law that applies to this FTCA action, although he disagreed with the court's analysis of that law. Petr. C.A. Br. 12-13.

heightened inspections that constituted stopping the trains and requesting identification from crew members. The customs officials did not subject other crew members to a pat-down search. As the district court concluded, the pat-down search of petitioner was caused by petitioner's "obdurate and obstreperous" behavior and his active and forceful physical resistance. Pet. App. 5a, 37a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1995